No. 20063

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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A. & E. Plastik Pak Co., Inc.,

*Appellant,*

*vs.*

William N. Bowie, Jr., Trustee,

*Appellee.*

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## APPELLANT'S OPENING BRIEF.

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### I.

### STATEMENT OF JURISDICTION.

The Referee had jurisdiction of this matter pursuant to Title 11, *U.S.C.A.* §11, conferring jurisdiction over bankruptcy matters upon the Courts of Bankruptcy, together with Title 11, U.S.C.A. §46(b), which enlarges the said jurisdiction by consent of the defendant. The United States District Court had jurisdiction to review the Order of the Referee pursuant to Title 11, *U.S.C.A.* §67(c), which grants to a person aggrieved by an Order of a Referee the right to petition for review of said Order by a Judge of the District Court. This Court of Appeals for the Ninth Circuit has jurisdiction over this Appeal pursuant to Title 11, *U.S.C.A.* §47(a), which grants to this Court Appellate jurisdiction over controversies arising in proceedings in bankruptcy.

## II.
## STATEMENT OF THE CASE.

Appellant, A. & E. Plastik Pak Co., Inc., a California corporation (hereinafter referred to as "A. & E.") is a creditor of Holland Bulb Importers, Inc., Bankrupt (hereinafter referred to as "Holland Bulb"). Appellee, William N. Bowie, Jr. (hereinafter referred to as the "Trustee") is the Trustee in Bankruptcy of Holland Bulb [T. R. p. 3]. On December 11, 1962, over eleven months prior to the filing of the Involuntary Petition in Bankruptcy, A. & E. filed suit on its claim against Holland Bulb and others in the Municipal Court of Los Angeles Judicial District, located in Los Angeles, California, and pursuant to said litigation, on December 12, 1962, caused the Los Angeles County Marshal to levy a Writ of Attachment upon the bank account of Holland Bulb at Security First National Bank (hereinafter referred to as "the Bank"). On December 13, 1962, the Bank made a "not indebted" return on said Attachment, but on January 30, 1963, as a result of proceedings against the Bank pursuant to *California Code of Civil Procedure,* §545, the Bank made an amended return to the Writ of Attachment stating that the Bank was holding $2,579.02 in Holland Bulb's Account No. 078675 [T. R. p. 3]. A. & E.'s claim against Holland Bulb exceeds the amount of $2,579.02 [T. R. p. 4].

It is undisputed that the Attachment of A. & E. was a valid and existing Attachment under California law, having all of the characteristics incident thereto, and that the said Attachment existed as of December 12, 1962, over eleven months prior to the filing of the Involuntary Petition in Bankruptcy hereinafter referred

to [T. R. p. 4]. On November 18, 1963, an Involuntary Petition in Bankruptcy was filed against Holland Bulb, and thereafter, adjudication as a bankrupt occurred on December 13, 1963 [T. R. p. 5]. A. & E. did not know, nor have reason to believe, that Holland Bulb was insolvent at any time prior to November 18, 1963 [T. R. p. 6].

On June 2, 1964, the Trustee filed an Order To Show Cause and Petition, pursuant to which the Court issued a temporary Restraining Order restraining A. & E. from proceeding with the Municipal Court suit which had been set for trial July 27, 1964 [T. R. pp. 2, 4]. Hearings were had on the said Order To Show Cause, and the Referee, on October 30, 1964, concluded that the Trustee was vested with title to the attached funds [T. R. p. 6] and made its Order restraining A. & E. from proceeding against the attached funds of Holland Bulb, or against any monies of Holland Bulb held by the Bank pursuant to the amended return to the Writ of Attachment dated January 30, 1963 [T. R. pp. 8, 9]. On Petition for Review the United States District Court, on March 11, 1965, affirmed the Order of the Referee [T. R. p. 10]. On March 22, 1965, Notice of Appeal to this Court was filed [T. R. p. 12].

The questions involved in this Appeal are as follows:

(1) Is a valid California Attachment perfected over eleven months prior to bankruptcy voidable under The Bankruptcy Act?

(2) Is the Trustee in Bankruptcy Vested with title to funds which are subject to a valid California Attachment Lien obtained over eleven months prior to bankruptcy?

Appellant contends that both of the above questions should be answered in the negative, and that the Order of the District Court affirming the Order of the Referee should be reversed.

## III.
## SPECIFICATION OF ERRORS.

Appellant contends that the Order below is based upon the following errors contained in the Conclusions of Law and Order of the Referee:

(1) The Order of the Referee is based upon the erroneous conclusion that the time of acquisition of a valid California Attachment is immaterial to the Trustee's Claim of Title.

(2) Conclusion of Law Number IV [T. R. p. 6] is in error in that it vests with the Trustee by operation of law the title to the proceeds of an Attachment, valid and existing under California law, which Attachment existed over eleven months prior to the filing of the Involuntary Petition In Bankruptcy herein.

(3) Conclusions of Law Numbers III, IV, VI and VII [T. R. pp. 5, 6, 7] are erroneous in that they are based upon the erroneous legal conclusion to the effect that a perfected Attachment under California law existing over eleven months prior to the filing of the Involuntary Petition In Bankruptcy herein vests title to the attached property in the Trustee, free of the Attachment lien, upon the filing of the Petition In Bankruptcy.

(4) The entire Order of the Referee hereinabove referred to is based upon the erroneous con-

clusion of law to the effect that funds attached by a creditor of bankrupt over eleven months prior to the filing of the Petition In Bankruptcy, at a time when the creditor did not know, or have reason to believe that the bankrupt was insolvent, may nevertheless be seized by the Trustee in Bankruptcy as assets of the bankrupt estate, and the granting of a Restraining Order as a consequence thereof was and is erroneous.

## IV.
## ARGUMENT.

### A. Summary of Argument.

A California attachment perfected over four months prior to the filing of a Petition in Bankruptcy is not voidable under the Bankruptcy Act. Title to the Bankrupt's property which is vested in the Trustee is subject to all valid claims, liens and equities and is subordinate to a California attachment perfected over four months prior to filing. The rule of *Rialto Publishing Co. v. Bass,* 325 F. 2d 527 (9 Cir. 1963) is limited to situations where the attachment was made *within* the four months prior to the filing of a Petition in Bankruptcy.

### B. An Attachment Perfected Over Four Months Before Bankruptcy Is Not Voidable Under the Bankruptcy Act.

The Bankruptcy Act exempts from attack by the Trustee any Attachment perfected over four months before the filing of the Petition in Bankruptcy. *4 Collier on Bankruptcy*, Paragraph 67.07, pp. 88, 89. This has been the unchallenged posture of the law since 1902,

when *Metcalf v. Barker,* 187 U.S. 165 (1902) held that an Attachment obtained more than four months prior to the filing of the Petition in Bankruptcy is expressly recognized by The Bankruptcy Act as valid.

It has even been held that although the Levy of Attachment merely perfects an "inchoate" lien arising over four months prior to bankruptcy, the Attachment is valid although levied within the four months period prior to the filing in Bankruptcy. *4 Collier On Bankruptcy,* Paragraph 67.07, pp. 90, 91; *Irby v. Covey,* 95 F. 2d 963 (5 Cir.) (Attachment perfecting an inchoate landlord's lien); *Brown Shoe Co. v. Wynne,* 281 Fed. 807 (5 Cir.), reversing *Matter of Wright & Weissinger* (D.C. Miss.), 277 Fed. 514.

The Court of Appeals for the Ninth Circuit has heretofore held that a California Attachment obtained prior to the four month period preceding the filing in Bankruptcy was valid against the Trustee in Bankruptcy reversing the U.S. District Court which held otherwise. *In re Maier Brewing Co., Inc.,* 65 F. 2d 673 (9 Cir., 1933), cert. den. *sub nom. Wells v. Simons,* 290 U.S. 695.

### C. The Order of the Referee Is Erroneous Under Section 70 of the Bankruptcy Act.

Sec. 70 of the Bankruptcy Act (11 *U.S.C.A.* §110) refers to the title to the Bankrupt's property which is vested in the Trustee. Sec. 70 merely vests title in the Trustee to the Bankrupt's property, but does not vest in the Trustee any better right or title than that which belonged to the Bankrupt at the time when the Trustee's title accrues. The Trustee takes the property *subject to all valid claims, liens, and equities.*

This is clearly set forth in *4 Collier On Bankruptcy,* Paragraph 70.04, beginning at p. 954.1 as follows:

> "The Courts are frequently moved to reassert the general rule that the act 'does not vest the Trustee with any better right or title to the Bankrupt's property than belongs to the Bankrupt or his creditors at the time when the Trustee's title accrues'. This is true in that the Bankruptcy Trustee is not a bona fide purchaser or encumbrancer for value, but takes the property *subject to all valid claims, liens and equities."*
>
> *Zartman v. First National Bank of Waterloo,* 216 U.S. 134 (1910);
>
> *Anglo Bank v. Schenley Industries, Inc.,* 215 F. 2d 651 (9 Cir., 1954);
>
> *Hyman v. McLendon,* 140 F. 2d 76 (4 Cir., 1944).

The only transferred property which is vested in the Trustee pursuant to §70, insofar as is here applicable, *is property wherein the liens obtained were within four months of bankruptcy, and preferential transfers of the Bankrupt's property effected within the four month period.*

*4 Collier on Bankruptcy,* §70.04, p. 957.

### D. The Order of the Referee Is Contrary to Metcalf v. Barker.

The case of *Metcalf v. Barker, supra,* is decisive of the issues presented. In that case a creditor's suit, which operates as an equitable lien on the debtor's property, was commenced by plaintiff on December 17, 1895, and Judgment was entered thereon January 31, 1899. Bankruptcy followed on May 12, 1899, and the

attorney for the Trustee in Bankruptcy contended that inasmuch as the Judgment was obtained within the four month period, the title to the property upon which the lien attached was in the Trustee, free and clear of the lien, since the previous equitable lien which preceded the Judgment was "inchoate".

The U.S. Supreme Court rejected this argument and held that the December 17, 1895 lien was good against the Trustee. The Court in the *Metcalf* case stated in part as follows, commencing on page 172:

> "Doubtless the lien created by a Judgment creditor's bill is contingent in the sense that it might possibly be defeated by the event of the suit, but in itself, and so long as it exists, it is a charge, a specific lien, on the assets, not subject to being divested save by payment of the Judgment sought to be collected."

The *Metcalf* decision also discussed the matter of the constitutional power of Congress to displace valid statutory liens as distinguished from the intention of Congress to do so, and concluded from an examination of the Bankruptcy laws that Congress had never attempted to do so. No change in the Bankruptcy laws would cause the decision to be different today since §67, referred to in the *Metcalf* decision, is little changed. §67 of The Bankruptcy Act (11 *U.S.C.A.* §107) makes all levies, judgments, attachments or other liens obtained through legal or equitable proceedings against a person who is insolvent, at any time within four months prior to the filing of a Petition in Bankruptcy, null and void.

The *Metcalf* decision stated on this subject as follows on page 174:

> "In our opinion the conclusion to be drawn from this language is that it is the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated, and that *where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized.* When it is obtained within four months the property is discharged therefrom, but not otherwise. A judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens. *If this were not so the date of the acquisition of a lien by attachment or creditor's bill would be entirely immaterial.*" (Emphasis added)

Accordingly, the Supreme Court held that despite the fact that the December 17, 1895, equitable lien was "contingent" and "inchoate," it was in fact a valid lien subject to contingencies, and that inasmuch as it was obtained prior to the four month period preceding bankruptcy, it was valid and could not be set aside at the instance of the Trustee.

The *Metcalf* decision is decisive of the issue presently before this Court. The A. & E. Attachment, over eleven months prior to bankruptcy, could not be nullified by the Trustee.

**E. The Order of the Referee Is Erroneous Under Section 60 of the Bankruptcy Act (11 U.S.C.A. §96) Which Validates Inchoate Attachment Liens Obtained Four Months Prior to Bankruptcy.**

§60 of The Bankruptcy Act, subdivision (a)(1), provides that a preference is a transfer of any of the property of debtor to or for the benefit of a creditor for or on account of an antecedent debt ". . . made or suffered by such debtor while insolvent and *within four months before the filing* by or against him of the Petition initiating a proceeding under this Act. . . ."

§60(a)(2) provides that a transfer of personal property is deemed to have been made or suffered at the time when it became so far perfected ". . . that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee. . . ."

Subdivision (a)(4) *specifically provides* that a lien "obtainable by legal or equitable proceedings" is a lien arising ". . . upon *Attachment, Garnishment,* Execution or like process, *whether before,* upon, *or after* Judgment or Decree and whether before or upon levy." (Emphasis added).

Any lien obtained through judicial proceedings is a transfer within the meaning of §60 of The Bankruptcy Act. *3 Collier On Bankruptcy,* Paragraph 60.46, p. 1014. The steps necessary to create such a lien and the point of time when such lien becomes perfected depends upon local law. *3 Collier On Bankruptcy,* Paragraph 60.46, p. 1014.

Under California law, the general rule that an Attachment operates as a lien from the time of the levy,

is applicable. *6 Cal. Jur. 2d,* §131, p. 40. Where the Attachment has been properly made, no subsequent lien upon such property can displace it, and the rule "First in Time, Stronger in Right" applies. *6 Cal. Jur.* 2d, §137, p. 45. The same rule applies between Attachments and other liens. *6 Cal. Jur. 2d,* §139, p. 48. *Scrivener v. Dietz,* 68 Cal. 1, 8, p. 609.

Hence, the requirement of The Bankruptcy Act, that no subsequent lien upon such property could become superior to the transferee's rights under State law, is satisfied.

Here, there is no dispute of the fact that the Attachment was perfected eleven months before the filing of the Petition In Bankruptcy, and hence, the lien of Appellant, A. & E., is clearly beyond the reach of the Trustee in Bankruptcy.

### F. Rialto Publishing Co. v. Bass Is Distinguishable From the Present Case.

The Trustee, however, relies heavily upon the case of *Rialto Publishing Co. v. Bass,* 325 F. 2d 527 (9 Cir. 1963). In the *Rialto* case, the creditors levied Attachment June 22, 1961, and *within four months,* on September 15, 1961, an Involuntary Petition In Bankruptcy was filed. *All of the said facts occurred within the four months prior to bankruptcy.* The facts also indicated that June 22, 1961, the creditors had no reasonable cause to believe the bankrupt was insolvent, but that in July of 1961, when the Judgments were reduced to cash, the creditors did have reasonable cause to believe that the bankrupt was insolvent.

The Court of Appeals for the Ninth Circuit upheld the action of the Referee and Trial Judge in holding

that the transfers were voidable preferences, on the ground that the California Attachment was a "contingent lien" citing *Puissegur v. Yarbrough,* 29 Cal. 2d 409, followed in two tax cases, *Ward v. Commissioner of Internal Revenue,* 224 F. 2d 547 (9 Cir., 1955) (holding that $17,000.00 of purchase price of a business was taxable to Ward in 1946 though an Attachment prevented his obtaining the cash until 1947), and *United States v. Security Trust & Savings Bank,* 340 U.S. 47 (holding that a tax lien of the United States was prior in right to an Attachment lien where the federal tax lien was recorded subsequent to the date of the California Attachment but prior to the date the attaching creditor obtained judgment).

The entire series of decisions are hinged upon the *Puissegur v. Yarbrough* decision, in which the California Supreme Court simply held that a party served with a Writ of Attachment should not have paid the money over to the attaching creditor, but should have paid the moneys to the Sheriff, and that consequently, the debt was still unpaid, since the attaching creditor obtained only a "potential right or a contingent lien" as a result of the Attachment. None of the cases hereinabove cited can have any controlling significance in construing the specific provisions of The Bankruptcy Act hereinabove referred to since none pertained to bankruptcy cases.

It is submitted that the *Rialto* case is limited to factual situations wherein the Attachment is levied within four months of the bankruptcy filing and can have no application whatsoever to this case where over eleven months expired between the Attachment and the bankruptcy. Otherwise, the *Rialto* case would be at variance with *Metcalf v. Barker.*

To hold otherwise would be to make the provisions of §§60 and 67 of *The Bankruptcy Act* (11 *U.S.C.A.* §§96 and 107), which allows the annulment of Attachments created within four months of bankruptcy, meaningless.

V.

## Conclusion and Prayer.

Various State liens and encumbrances are "inchoate" or "contingent", such as Landlord's Liens, Mechanic's Liens, Pledges and Attachments. The Bankruptcy Act specifically recognizes and allows such encumbrances created four months prior to bankruptcy to stand unimpaired. The *Rialto* case dealt solely with facts occurring within the four month period prior to the filing of the Petition In Bankruptcy, and consequently, does not extend to Attachments outside the four month period. If the four month rule is to be changed it should be done by congressional action, not by this honorable Court.

Wherefore, Appellant respectfully prays as follows:

(1) That the Order of the U. S. District Court affirming the Order of the Referee be reversed.

(2) That the Restraining Order be dissolved.

(3) That Appellant should be awarded its costs, together with such other relief as is appropriate.

Respectfully submitted,

MEYER BERKOWITZ,
*Attorney for Appellant,*
*A. & E. Plastik Pak Co., Inc.*

## Certificate.

I certify that in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing Brief is in full compliance with those Rules.

MEYER BERKOWITZ